Supreme Court, U.S.
FILED
DEC 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-747

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES LEROY TIMBERLAKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that his sentence based upon a plea of guilty should be vacated because the charges of conspiracy to import cocaine under 21 U.S.C. 963 and conspiracy to violate the Travel Act under 18 U.S.C. 371 constitute a single offense.

1. Following indictment on six counts by a federal grand jury in the Eastern District of Oklahoma, petitioner pleaded guilty to one count (Count I) of conspiracy to import cocaine, in violation of 21 U.S.C. 963, one count (Count V) of conspiracy to travel in interstate and foreign commerce to promote an unlawful activity, in violation of 18 U.S.C. 371 and 1952(a)(3), and one count (Count VI) of traveling in interstate and foreign commerce to promote an unlawful activity, in violation of 18 U.S.C. 1952(a)(3). Petitioner was sentenced to 15 years' imprisonment on the drug importation conspiracy in Count I, a consecutive term of five years'

imprisonment on the Travel Act conspiracy in Count V, and a consecutive five-year term of imprisonment on the substantive Travel Act violation in Count VI.[1] Pursuant to the plea agreement, the government dismissed the remaining three counts in the indictment, which charged petitioner with importing cocaine, possessing cocaine with intent to distribute it, and conspiring to possess cocaine with intent to distribute it. The plea agreement contained no promises or understanding concerning the sentence that petitioner would receive (Pet. App. 2).

2. Petitioner was a co-defendant of Mitchell Skiff Engelhart, who has filed a petition for a writ of certiorari (No. 85-5473) to review the decision of the Tenth Circuit that disposed of the appeals of both defendants. The factual background and question presented in the two petitions are the same and are discussed in our brief in opposition to Engelhart's petition.[2] For the reasons there stated, further review is not warranted in either case.[3]

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[1]Petitioner challenges his sentences only on the conspiracy counts and not on the substantive Travel Act count.

[2]Review of Engelhart's petition would be especially unwarranted since he, unlike Timberlake, received concurrent sentences on the drug conspiracy and Travel Act conspiracy counts that he challenges.

[3]A copy of our opposition to Engelhart's petition is being sent to counsel for Timberlake.

We also note that the instant petition may have been untimely under Rule 20.1 of the Rules of this Court. The judgment of the court of appeals was entered on July 23, 1985, and the petition was filed on October 21, 1985. Since petitioner did not seek rehearing in the court of appeals, it appears that his petition for a writ of certiorari is out of time. While co-defendant Engelhart did seek rehearing of his appeal (see 85-5473 Pet. Apps. B, C), that would not seem to affect the time for Timberlake to file a petition for certiorari in his case. See Sup. Ct. R. 20.4. However, since Engelhart and Timberlake were co-defendants in the district court, and since the Tenth Circuit treated the two appeals together and disposed of them in one opinion, the application of Rule 20.4 is not entirely clear.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1985

DOJ-1985-12